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NO. 80 - 5904

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

ORIGINAL COPY

JOHN R. SITTON

Appellant-Petitioner

vs

THE STATE OF TEXAS

Appellee-Respondent

REPLY TO MOTION TO DISMISS

OR AFFIRM

ATTORNEY FOR APPELLANT-PETITIONER

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vs

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REPLY TO MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE COURT:

INTRODUCTION

SITTON in his STATEMENT OF JURISDICTION AND/OR PETITION FOR WRIT OF CERTIORARI raised four problems for this Court's consideration:

K(1) The Texas law requires a culpable state of mind for the offense of speeding; yet the Trial Court (Court of last resort in this case) held that none was needed.

K(2) The Texas speeding law is unconstitutionally vague.

K(3) The Texas speeding law is unconstitutional because conviction under it rests upon a burden-shifting presumption.

K(4) The Texas speeding law violates substantive due process because it is legislation in an area without standards; and the Legislature cannot do this in the way in which it did.

Although the substance of the answer filed herein by the Travis County Attorney in her MOTION TO DISMISS OR AFFIRM is somewhat uncertain, she, at least, spoke to each problem above (under her ARGUMENT, p.2) using arabic numbers. This REPLY will be in kind - so that the problems as presented, as answered and as rebutted will be:

| IN THE STATEMENT and/or PETITION | IN THE MOTION TO DISMISS OR AFFIRM | IN THIS REPLY |
|---|---|---|
| K(1) | 1. | I(Mens Rea) |
| K(2) | 2. | II(Vagueness) |
| K(3) | 3. | III(Presumption) |
| K(4) | 4. | IV(Substantive Due Process) |

## I (MENS REA)

The Travis County Attorney missed the point of SITTON'S first problem. She simply says that crimes can exist that require no mens rea. With this SITTON has no quarrel. She further says that such is the case with speeding, and with this - in general - SITTON again has no quarrel. But she finally concludes that such is the case in Texas, and with this SITTON quarrels vigorously and says:

A.

a. In 1973 (to take effect 1/1/74) the Legislature of Texas adopted a new penal code (unless otherwise noted, this shall be referred to as PC).

b. In the PD, nothing constituted

> "... an offense unless it is defined as an offense by statute, municipal ordinance, order of a county commissioners court, or rule authorized by and lawfully adopted under a statute." Sec. 1.03(a) PC.

c. Titles 1, 2 and 3 of the PC (consisting of Sec. 1.01 through Sec. 12.51 inclusive) applied not only to "crimes" or "offenses" set out in the PC but

> "... to offenses defined by other laws,..." Sec. 1.03(b) PC.
>
> (Accordingly Titles 1, 2 and 3 PC apply to Art. 6701d Texas Civil Statutes [herein TCS] which contains Sec. 166, otherwise the Texas speeding law.)

d. Furthermore the PC defined the elements of any offense as:

> "(A) the forbidden conduct;
> (B) the required culpability;
> (C) any required result; and
> (D) the negation of any exception to the offense." Sec. 1.07(a)(13) PC.

e. Further, and most important(!), the PC provided that

> "... a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires." Sec. 6.01(b) PC.

f. The only thing excepted from this requirement of "culpability" or "mens rea", was, where the statute (defining the crime) "plainly" dispenses with such a requirement:

> "If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element." Sec. 6.02(b) PC.
>
> (All underlining or emphasis is by the writer unless otherwise specifically noted.)

g. And further:

> "If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b) of this section, intent, knowledge, or recklessness suffices to establish criminal responsibility." Sec. 6.02(c) PC.
>
> (Simple negligence accordingly will not suffice to impose criminal responsibility COLE v STATE 556 SW(2) 343.)

h. Hence the law of Texas underwent a change.

> "... the Court in prior cases held that such knowledge need not be alleged in the indictment, but if lack of knowledge were raised by the evidence, the jury must be cahrged to axquit if there were a reasonable doubt on the matter... . ... Under the new penal code, in constrast, the culpable mental state is expressly made, not a defense, but an element of the offense, V. T. C. A., Penal Code Sec. 1.07(a)(13)(B), and this is so even where the culpable mental state is not expressly stated in the statutory definition of the offense. Sec. 6.02 (b),..." GOSS v STATE 587 SW(2) 782.

i. Nowhere in Art. 6701d, Sec. 165 TCS does the Legislature "plainly" dispense with the requirement of culpability

> (See the quotation of the speeding law in the Travis County Attorney's MOTION TO DISMISS OR AFFIRM beginning on p. 1. It is difficult to prove a negative; BUT A READING OF THE ENTIRETY of Art. 6701d TCS [otherwise known as the traffic code of Texas] will reflect that nowhere does the Legislature "plainly" dispense with the requirement of culpability for the violation of any section of that code.)

B.

In very early days this Court considered the question of whether the (any) Legislature could eliminate the requirement of "mens rea" from an act for which criminal responsibility ensued. Two of the earliest and most cited cases are US v BALINT 258 US; 66 LE 604; 42 SC 301, and US v BEHRMAN 258 US 280; 66 LE 619; 42 SC 303.

> "In those cases this Court did not construe mere omission from a criminal enactment of any mention of criminal intent as dispensing with it." MORISETTE, infra.

BALINT mde the question of dispensing with mens rea "...a question of legislative intent to be construed by the court..."

The next case of import to appear in this area was US v DOTTERWEICH 320 US 277; 88 LE 48; 64 SC 134:

"The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct - awareness of some wrong doing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."

citing BALINT.

In 1951 this Court decided that a comprehensive discussion of the matter was needed so it chose MORISETTE v US 342 US 246; 96 LE 288; 72 SC 240 to do it. The offesne was a violation of 18 USC 641 (purloining government property). Morisette had taken three tons of bomb casings from a bombing range and sold them. No (culpability) mens rea was alleged nor proven.

The Court went into the history of the requirement of mens rea and pointed out the "accelerating tendency"..."to call into existence new duties and crimes which disregard any ingredient of intent...". Among other types of crimes discussed as a resultant of the "industrial revolution" was that relating to "(T)raffic of velocities, volumns and varieties unheard of, came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct."

BUT THERE IS ONE THING THA MORISETTE MAKES CLEAR. IT IS TALKING ABOUT LEGISLATION, NOT COURT CONSTRUCTION - NOT COURT LEGISLATION.

Hence says the Court "legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element."

The Court as noted above, says that in BALINT congressional intent was ofund to eliminate the requirement of mens rea. And in MORISETTE this Court found legislative intent to do the same. The most that can be said of MORISETTE on this matter is its quotation from BEHRMAN:

"If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intnet."

(Even assuming that this statement is so, it is not applicable in Texas for as shown above the Texas Legislature maked culpability a requirement unless the same is plainly dispensed with in the legislative definintion of the offense, which it is not in speeding.)

In 1957 LAMBERT v CALIFORNIA 355 US 225; 2 LE(2) 228; 78 SC 240 appearedand this Court said:

> *"There is a wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition."*

*And fourteen years later in US v FREED 401 US 601; 28 LE(2) 356; 91 SC 1112 this Court in considering an offense under the National Firearms Act held that Congress had eliminated the requirement of mens rea for criminal responsibility and to do so it quoted BALINT:*

> *"Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."*

C.

*This is the basis for the following propositions:*

> *The Legislature can create a species of crime where culpability is eliminated as a required "element" of the offense.*
>
> *A court cannot take legislation which does not plainly dispense with the leement of culpability and judicially legislate such a dispensation.*

*BUT IN TEXAS*

> *THE LEGISLATURE SAYS THAT EITHER IT OR ITS DELEGEES ARE THE MAKERS OF "CRIME" OR "OFFENSES";*
>
> *FURTHER THE LEGISLATURE SAYS THAT CULPABILITY IS A MANDATORY REQUIREMENT FOR CRIME, AND EVEN IF THE DEFINITION OF AN OFFENSE HAS NO REQUIREMENT OF CULPABILIYT ONE IS NEVERTHELESS REQUIRED AS AN ELEMENT OF THE OFFENSE UNLESS IT IS PLAINLY DISPENSED WITH.*
>
> *FURTHER UNDER THE SPEEDING LAW OF TEXAS CULPABILITY HAS NOT BEEN PLAINLY DISPENSED WITH.*

*Accordingly under the teachings of this Court the conviction here must fail because no culpability was require at trial, and hence SITTON was denied his Constitutional rights.*

D.

*This Court - nor any court for that matter - cannot LEGISLATE (except "interstitially" to resolve ambiguities, SAXBE v BUSTOS 418 US 65; 42 LE[2] 231; 95 SC 272).*

*This proposition is so well established as to stand on its own; however if authority is necessary one can begin in 1885 with THORNLEY v US 113 US 310; 28 LE 999; 5 SC 491 and travel through LOUISVILLE & NRCo v CENTRAL STOCK YARDS 212 US 132; 53 LE 441; 29 SC 246 and DEWEY v US 178 US 510; 44 LE 1170; 20 SC 981 to a condemnation of statutory improvement as a motive for construing statutes other than what they say US v CALAMARO 345 US 351; 1 LE(2) 1394; 77 SC 1138 to the condemnation of statutory construction of social policy motivated by personal inclinations EVANS v ABNEY 396 US 435; 24 LE(2) 634; 90 SC 628.*

*(Little research would be needed to verify the fact that courts do not have the constitutional power to legislate even under the guise of "construction" or "interpretation". Cf. the Digest System under Const. Law, Key 70.)*

*In Texas from the earliest days the same law obtained. Cr. 8A Tex. Dig. Const. Law Key 70(1) et seq. As recent as Ex Parte DAVIS 412 SW(2) 46 the Court of Criminal Appeals of Texas (its highest court in criminal matters herein referred to CCrA) held that the fixing of penalties was a Legislative Matter and not for the courts, and in SLAGLE v STATE 570 SW(2) 916 the CCrA echoing its long history said that the appropriateness of a presumption of intoxication was a Legislative Decision, the construction of which "... is foreclosed by the Legislature's judgment..." as reflected by the act creating the presumption. In short where the Legislature has plainly spoken , it makes no difference if such pronouncements may be (or need to be) improved, nor if they can be made better societally, nor if the personal inclination of a judge wants them to be otherwise, nor for any other reason may a court change what the Legislature has said.*

*(The inevitable line between Constitutional permissibility and impermissibility begins to emerge from the cloud that lies between true Judicial "construction" - or "interstitial" legislation for clarification of ambiguities [a form of "construction], see SAXBE, supra - and true Judicial "Legislation". FOR if one is into construction one is in the area of constitutionally delegated judicial functions; whereas if one crosses the line one violates the constitutional mandate of division of powers. A Court canno Constitutionally Legislate.)*

*ACCORDINGLY, here, the problem is manifest. The Texas Legislature has spoken. Speeding requires a culpable state of mind unless the Legislature "plainly" dispenses with such a requirement which it has not done. By the lower court eliminating such a requirement it denied SITTON due process of law.*

F.

*One more thing need to be discussed here and this is ZULAUF v STATE 591 SW(2) 869.*

*ZULAUF was convicted of speeding, fined and appealed his case to the CCrA. His second point of error wsa that the complaint (which is the operable paper in a speeding offense in Texas, Art. 45.01 Texas Code of Criminal Procedure, herein TCCrP) was fundamentally defective for failure to allege a culpable state of mind. The CCrA disagreed and in doing so gave its reasons, as it must do by Statutory Mandate, Art. 44.24 TCCrP as follows:*

1. *"The clear command of Article 6701d, Sec. 166, supra, that:*

   *'...(n)o person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the circumstances then existing...'*

   *provides more than adeuate support for our holding herein that the Legislature intended to make*

*speeding a strict liability offense where liability would not be contingent upon the allegation of a culpable mental state."*

*(the emphasis on the words shown above was put on them by the CCrA)*

*(See below).*

*2. The CCrA relied on GOODWIN v STATE 138 SW 399 and quoted from that opinion as follows:*

*"Very few people in driving a car have an evil intent; but the Legislature, in protection of the public, has decreed it wise to limit the speed at which these cars may run, and each one is required to keep within that limit."*

*(GOODWIN was a 1911 case at which time Texas had a rigid speed limit, i.e. no car may travel faster than X miles per hour; and it was decided at a time when "no culpability" was a defense, not an element of an offense which had to be proven by the prosecution, supra.)*

*3. Then the CCrA referred to VALLEJO v STATE 408 SW(2) 113; WILSON v STATE 328 SW(2) 311 and ROWLAND v STATE 311 SW(2) 831 for the proposition that similar complaints had been held sufficient*

*"... notwithstanding the lack of a culpable mental state..."*

*(None of those cases raised the issue of invalidity due to lack of a culpable mental state.)*

*4. Then the CCrA says that it has repeatedly held that no culpable state was requried for intoxicated driving and cites GREER v STATE 544 SS(2) 125; Ex Parte ROSS 522 SW(2) 214 and OWEN v STATE 525 SW(2) 164.*

*(DWI really has nothing to do with speeding. Furthermore in Chapter Eight and Chapter Nineteen of the PC the Legislature deliberately and very "plainly" dispensed with a mental state in any crime involving intoxicants, see infra.)*

*5. Finally the CCrA says:*

*"Given the absolutely obligatory character of the language consistently used by the Letislature in denouncing the offense of speeding, we are satisfied that the Legislature intended to and has dispensed with a culpable mental state as an element of the offense."*

First of all the CCrA is clearly Legislating here in violation of the Constitution of the State of Texas and the Constitution of the United States . The Judiciary cannot Legislate. Yet the CCrA has done so here. How? By saying that since the Legislature used the word "shall" it expressed an intent to eliminate or dispense with a mens rea or a mental state in the crime or offense of speeding.

The absolute irrationality of this is shown in GOSS v STATE 582 SW(2) 782 and ROGERS v STATE 589 SW(2) 132 where a mental state or mens rea or culpable state of mind was found to be necessary for violation of Art. 6701d, Secs. 38 adn 40 TCS (failure to stop and render aid). Those sections of the same Art. 6701d TCS (wherein is legislated the speeding law) say that a driver "shall" stop; "shall" return; "shall" reaimn at the scene; "shall" do so without obstructing traffic; "shall" give his name; "shall" if requested exhibit his license; and "shall" render reasonable assistance. In short, where "shall" is used six (6) times the CCrA found no express or plain dispensation of culpability; yet where "shall" was used once (1) it was a "clear command", it was "more than adequate support", and it was of an "absolutely obligatory character" to show legislative intent to expressly and/or "plainly" dispense with the requirement of culpability.

The terrible irony of this is that in BROWN v STATE 600 SW(2) 834 the very same Judge who wrote the tuilty words of ZULAUF vigorously reaffirmed the holding of GOSS and ROGERS that Art. 6701d, Secs. 38 and 40 TCS require a culpable state of mind (where the statute used the word "shall" six times):

(And in another posture the same Judge wrote words like

> "Given the heavy emphasis in the penal code on existence of one or another culpable mental state as an element of a penal offense..."

and

> "Instead of adapting an outmoded rationale we should insist that a felony murder indictment state outright the appropriate culpable mental state in relation to commission of the acts that cause death."

and dissented becasue the CCrA refused to require a culpable state of mind be alleged in an "attempt" type crime. Ex Parte BAILEY 600 SW[2] 333.)

In MORISETTE, as quoted above, this Court noted that BALINT and BEHRMAN had not used the absence of a required intent in the statute to find legislative intent to eliminate it as an essential element of a crime.

(Nor did MORISETTE - nor any other case - ever hold that if the legislature did in fact eliminat it, that couldn't be used as a defense, i. e. that the lack of intent due to accident, mistake of fact, insanity, etc., couldn't be

used as a defense. Yet the CCrA did, for in HERNANDEZ v STATE an unpublished per curiam opinion the CCrA held that mistake of fact couldn't be used as a defense to speeding. HERNANDEZ appears (by reference only) in 579 SW(2) 478, but its opinion reflecting the CCrA's "reasons" for its judgment was not published under the local rules. A copy of the opinion is attached, and since the CCrA is required by Art. 44.24 TCCrP to give their "reasons" - such opinion becomes a part of that vast body of law called stare decisis and may be used - especially to show what the highest court of any state has done. The absolute inanity of the CCrA's position in this matter is made manifest. If a criminal coerced one into speeding at gun point, the driver is guilty of speeding; if an accident occurred such as braking on a hill and sliding to 40 mph in a a 30 mph prima facie zone, then one is guilty; the list is endless and each as irrational as the next. Even though voluntariness is a statutory mandate for the commission of and "offense", Sec. 6.01[a] PC , it isn't for speeding according to the CCrA. Every statutory defense (Chapter Eight PC) is now totally denied to a defendant charged with speeding - and all because the CCrA decided on its own that the word "shall" evidenced a Legislative Intent to eliminate or "plainly" dispense with the requirement of culpability in the offense of speeding.)

The bottom line here is that SITTON was denied due process of law because the trial court below in the face of a Legislative Mandate denied him the right to have the case thrown out (or at least refiled) for the want of an allegation of culpability (which caused the complaint to spell out no crime) and denied him the right to have the jury determine if he had the required culpability (required, that is, by the Legislature).

(Note: How does the legislature "plainly" dispense with the requirement of culpability? Certainly no one would seriously contend that a specific express dispensation would be invalid - or unconstitutional. Agains the Legislature may, by ancilliary acts, dispense with the requirement of culpability, thus in ROSS the CCrA determined that the Legislature had expressly dispensed with the requirement of culpability in cases invovling intoxicants because in Sec. 8.04(d) PC and Sec. 19.05(b) PC the Legislature defined "intoxication" to mean that the person involved doesn't have the normal use of his mental faculties, thus making any kind of mental state irrelevant. May the Legislature "plainly" dispense with the requirement of culpability by moving one statute from one number to another? Or by a change in its content? This is suggested in AMERICAN PLANT v STATE 587 SW[2] 679, and ZULAUF cited AMERICAN PLANT ; BUT if this is sothen the requirement of culpability was reinstated in the Texas speeding law since Texas changed its speeding law from a "rigid" law which clearly dispenses with culpability - to the more flexible prima facie reasonable and prudent law in 1951, where the requirement of culpability is clearly implied by using the word "reasonable" for it is impossible to something that is "unreasonable" without knowledge or a mental state of some sort or another. Viz., see FIRST CITY N. BANK v JAPHET 390 SW[2] 70, Ct. Civ. Apps. Houston, 1965, Appl. for Writ of Err. Den'd. by Sup. Ct. for want of Jurisdiction, in which it was held that a man was not guilty of negligence when where he suffered a heart attack and lost consciousness, cr. Rest. Torts Sec. 166. In any event the Legislature, it is submitted, cannot "plainly" dispense with culpability by using the word "shall" only as ZULAUF says it did. ZULAUF crossed the dimly perceived line between Consitutionally permissible judicial construction into Constitutionally impermissible judicial legislation. If the use of "shall" (the mandatory form of to-be) permits such a judicial construction of the speeding statute, then the CCrA could use the same device to eliminate the requirement of culpability from any defined crime where the mandatory form of

*of any verb is used. Such is irrationality carried to sublime heights.*

*II (VAGUENESS)*

*Once more the Travis County Attorney misses the problem SITTON has raised.*

*Texas has a longish history of the void-for-vagueness doctrine:*

In GRIFFIN 218 SW 294 (1920), the Court held void for vagueness a statute which proscribed the operation of a car at night with headlights which would seriously interfere with an oncoming car or temporarily blind an oncoming driver because - whether or not the act was a crime - it was

> "...made to depend largely upon the peculiarities that may affect the vision of the driver of the approaching vehicle.
>
> That the statute is commendable in purpose, that it strikes at an annoying evil, is not to be questioned; but its terms are so vague that we are constrained to hold that, under the principles obtaining in the framing of criminal statutes, it is inoperative and unenforceable as denouncing a crime."

In ANDERSON 21 SW(2) 499 (1929), the disguise statute was held void for vagueness because the criminal act was made to depend upon the beholder or the person offended.

In WILSON 59 SW(2) 399 (1933), the Court threw out the first DWI statute as being void for vagueness.

In CHERNOWSKY 217 SW(2) 673 (1949) the Court declared void for vagueness Art. 6701d, Sec. 51 TCS which made it an offense to drive (recklessly)

> "Without due caution or circumspection"

relying on GRIFFIN, supra.

In IRVEN 136 SW(2) 608 (1940) the Court declared that part of the liquor law void for vagueness which made certain acts offensive to public decency and used the GRIFFIN teaching to do so.

In PIERCE 75 SW(2) 264 (1934), the Court held a Houston ordinance void for vagueness which proscribed the distribution of "bills, or paper and advertising matter", relying on GRIFFIN.

(They also threw it out for substantive due process.)

In MEADOWS 109 SW(2) 1061 (1937) the Court held void for vagueness a Dallas ordinance making it illegal to drive (recklessly) in wanton disregard for the safety of persons or property relying on the GRIFFIN doctrine.

The Supreme Court of the State of Texas has relied on the GRIFFIN teachings to hold a part of the Sunday Law unconstitutional as void for vagueness in STATE v SHOPPERS WORLD, INC. 380 SW(2) 107 (1964).

And in 1932, the Commission of Appeals in ABBOTT vs ANDREWS 45 SW(2) 568 held that a statute providing that slow moving vehicles should keep to the right was void for vagueness using GRIFFIN. And twice in 1925, in GALVESTON H&SA vs DUTY 277 SW 1057, and in INTERNATIONAL & GN vs MALLARD 277 SW 1051, the Commission of Appeals held that GRIFFIN controlled the validity of a statute requiring a car - where the vision was obscured - to cross a railroad track at 6 mph. It declared the statute void for vagueness.

In 1942 the Court of Civil Appeals in Austin, in RR COMM. vs FT. WORTH & DC 161 SW(2) 560 used GRIFFIN to declare a statute void for vagueness which provided that a railroad could not use more than one engine except when going up a "steep grade".

In the recent HOWARD case (No. 56,991, 9/19/79) the CCA held that the loitering ordinance of the City of Austin was void for vagueness because it made it an offense to be in a public or private place

> "...without being able to give a satisfactory account..."

for being there; and there was nothing in the statute which defined

> "satisfactory account"

AND

> "..., such a standard delegates unguided and unrestrained discretion to the arresting officer to decide what answers given by a potential arrestee are 'satisfactory accounts' and which are not."

Also see NOWAK: CONSTITUTIONAL LAW (1978) at pages 726 etc.

*(A copy of the HOWARD opinion is attached.)*

*In short, the doctrine is clear both in Texas as well as in this Court:*

> *If a statute is so framed as to permit criminality-content to rest in the judgment of some third party, the courts, or the arresting police-person; or*
>
> *if the statute is framed so as to fail to give fair notice of the forbidden conduct*

*then the statute is impermissible under the Constitution of the United States, PAPACHRISTOU v JACKSONVILLE 405 US 156; 31 LE(2) 110; 92 SC 839.*

*In 1885, in US v REESE 92 US 214; 23 LE 563; ___SC ___, this Court said:*

> *"It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could rightfully be detained and who could be set at large."*

*MICHIGAN v DeFILLIPPO 443 US 31; 61 LE(2) 343; 99 SC 2627, held that police are not required to predetermine the constitutionality of a law they are supposed to enforce*

*"... with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement."*

*Certainty is requried of statutes particularly criminal statutes. The forbidden conduct must be made apparent from the statute so that reasonable men can know what their Legislature has determined to be their rightful or wrongful conduct. The Criminality-Content of a statute cannot be left up to a third party, to the courts or to the police. To do so is to put the standart for crime into the hands of an individual when the Soverign is the sole purveyor of what is or isn't a crime. Cr. 21 AJ(2) 97, Crim. Law Sec. 17. See also RAEBECK v NY 391 US 462; 20 LE(2) 741; 88 SC 1716.*

*6 ALR(3) 1326 does not reflect that the great weight of authority throughout the Untied States is in favor of the validity of such statutes as the Texas speeding law. The article does show that a divergence exists in various courts as to the vagueness of some such statutes as opposed to the clarity of others.*

*16 LE(2) 1231 (as supplementing prior articles in LE) reflects that the doctrine of bagueness as set out above is still viable.*

*(In Texas the Legislature - prior to 1951 - had enacted a rigid speed law. The so called prima facie reasonable and prudent speed law came into effect in 1951 and made its first appearance before the CCrA in ROWLAND v STATE 311 SW[2] 831 in 1957. Texas had only a three judge court at the time. One judge said the act was constitutional. One judge said it wasn't. And one judge said there was no need to decide the Constitutional Question. Later in EAVES v STATE 353 SW[2] 231, the judge who said the question didn't need answering, switched to vote for constitutionality - NOT BECAUSE OF THE ARGUMENTS FOR SAME - but becasue thrity other states had similar laws.)*

*No Texas Court has ever really made any kind of in depth study or decision on the question of the constitutionality of the Texas speeding law where the attack has been for vagueness.*

*Nor has this Court ever had the question as posed herein.*

*For the Travis County Attorney to say that the cases cited are only applicable to First Amendment rights is not only misleading but clearly without any relevancy whatsoever.*

*III (PRESUMPTION)*

*Where a person goes faster than the prima facie speed as SITTON might be considered to have been doing in this case; the State - as it did here - relied on the excessive prima facie speed to prove the essential element of unreasonableness.*

> *(If the State says that it relied on the opinion of the officer, then it cleraly runs afoul of the vagueness doctrine set out above, see II, supra, for then, clearly, the criminality-content of the speeding law is furnished by the opinion of a third party. Once a statute is so read, it fails under the vagueness doctrine for the alleged offender isn't able to give the same criminality-content to the statute as the policeman does; and contrarywise the policeman can give criminality-content to the action of the alleged offender who gives legal content to what he is doing. In short, one man's reason is another man's irrationality; this is probably the rationale behind this Court's description of the "standard" of "reasonable" as being "amorphous" PEYTON v NY ____US ___: 63 LE[2] 639; 100 SC ___.)*

*The Travis County Attorney cites THOMAS v STATE 474 SW(2) 692 for the proposition that "prima facie" evidence must be defined to the jury. This is so, BUT IT IS ALSO OMMISSIVE OF THE PERTINENT HOLDING OF THE CASE. THOMAS really, and relevantly here, stands for the proposition that the word "prima facie' means that a person is "presumed" to have been acting "unreasonably" unless he produce evidence to the contrary.*

*THOMAS, in short, makes the presumption that travelling over the prima facie speed limit is unreasonable and imprudent, a burden-shifting presumption squarely contrary to ULSTER COUNTY COURT v ALLEN 442 US 140; 60 LE(2) 777; 99 SC 2213 (as follows):*

> *Presumptions and inferences are a staple of our adversary system; there are times when it is "necessary" that one arrive at one fact flwoing from a proven or "basic" fact; BUT THE CONSTITUTIONAL VALIDITY OF SUCH EVIDENTIARY DEVICES DEPENDS ON THE STRENGTH OF THE CONNECTION BETWEEN THE PROVEN FACT AND THE PRESUMED FACT: AND IN A CRIMINAL CASE SUCH AN EVIDENCTIARY DEVICE CANNOT*
>
> > *"undermine the factfinder's responsibility at trial... to find the ultimate facts beyond a reasonable doubt."*
> >
> > *The most common device is the permissive presumption which permits - but doesn't require - the factfinder to infer a fact from a proven fact; BUT DOESN'T REQUIRE THE DEFENDANT TO DO ANYTHING, i.e. it doesn't place any burden on the defendant.*
> >
> > > *Under this device the test is whether there is a relationship between the proven fact and the inferred fact sufficient to permit the inference*

*Mandatory presumptions tell "... the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. "*

*Cf. THOMAS, supra, which interpretes Art. 670ld, Sec. 166(a) TCS to be a presumption which may be followed unless evidence is produced by the Defendant to rebut it.*

*There is a distinction*

*"... between a permissive presumption on which the prosecution is entitled to rely as one not-necessarily-sufficient part of its proof and a mandatory presumption which the jury must accept even if it is the sole evidence of the offense.*

*In the latter situation, since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt."*

*Permissibe presumptions may apply to a not-necessarily-sufficient part of the prosecution's case and the only Constitutional test is that there be some rational relationship between the proven fact and the inferred fact. (i.e the LEARY v US 395 US 6; 23 LE[2] 57; 89 SC 1532 test).*

*"As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in Leary."*

*So spoke this Court in ULSTER COUNTY COURT, which it echoed in SANDSTROM v MONTANA 442 US 510; 61 LE(2) 39; 99 SC 2450 and SANDSTROM clearly damns burden-shifting presumptions such as the one used in the case at bar.*

*(Here the facts reflect clearly that apart from the criminality-content given the situation by the police-person, the conviction of guilt rested solely on the presumption arising from the statute, for apart from such a presumption, there was no evidence of unreasonableness on the part of SITTON. In short "the sole and sufficient basis for the finding of guilt" in this case is the presumption. If it is the police-person's testimony that in her opinion SITTON was unreasonable, then she and she alone gave criminaltiy-content to his action, for he said he was acting reasonably.)*

*HERE THE FACT PROVEN was that SITTON was going more than 30 mph which the prima facie speed limit . Question?*

*CAN ONE SAY FROM THIS FACT ALONE THAT SITOON WAS ACTING IN AN UNREASONABLE AND/OR IMPRUDENT MANNER? Particularly where there were no hazzards shown to have existed at the time - BEYOND A REASONABLE DOUBT?*

OR

Does the inference of unreasonableness and/or imprudence flow from the proof of over prima facie limit speed BEYOND A REASONABLE DOUBT?

The answer is so obvious as to make the question(s) rhetorical.

IV (SUBSTANTIVE DUE PROCESS)

As in much of the other parts of her answer, the Travis County Attorney simply says "it isn't so" and offers no aythority other than her own (which is the weakest form of argumentation).

People, by Texas law have a natural right to the use of the streets. To say that the State of Soverign cannot control the use of the streets would be contrary to law and good sense, and SITTON does not now, nor before, say that. He does say however, that the Soverign has no power (or can't use it if it be had) to control the use of the streets as it has done here.

Substantive Due Process questions the power of the Soverign to go into various areas; Procedural Due Process questions whether the Soverign does this so as to protect rights afforded. Somewhere between the two rests the question of whether the Soverign has reasonably intruded into the area it seeks to govern. In short the reasonableness of the intrusion as compared to the reasoanbleness of the manner of the intrusion is deemed part of substantive due process.

Take for example this case. That the Soverign can control velocities of motor vehicles on streets is not denied; but they must do so by standards which are reasonable; and they must do so, so that a person intruded upon has a way of testing the intrusions. The middle point is what is being attacked here, and it is inserted into the category of substantive due process for it would seem (reasonably) that no Soverign intrusion can be sustained unless it be a rational intrusion; i.e. unless the actions sought to be governed relate rationally to the evil sought to be abated, and unless such rational relationship be made apparent in the Soverign's act of intrusion (Standards).

(This is not the same question as whether or not the intruded-on person's rights are protected.)

Here Texas seeks to curtail speed on public roads for public safety. If for example Texas said YOU CAN'T SPEED; clearly Texas has gone into matters it has no right to control, for speeding per se isn't sufficient for the Soverign to intervene. Suppose Texas says YOU CAN'T SPEED ON PUBLIC STREETS, then clearly Texas can legislate in such an area for safety sake, not only as to the driver but also as to others (citizenry). But if Texas were to say YOU CAN'T SPEED

*ON PUBLIC STREETS, and only say that, it would set a standard which in itself rationally reflects the relationship between speeding and the public welfare.*

> *(Some acts are so vicious in and of themselves as to obviate the necessity of making such rational relationship appear, ex.g. murder. But some acts, particularly those which are susceptible to legislation without a mens rea, need to have the rationality of their relationship spelled out otherwise the appearance of justice fails and people will have no respect for a law otherwise valid and useful to the public welfare. Ex.g. speeding: today with the 55 mph law of 23 USC 154, Texas passed Art. 6701d, Sec. 169B TCS which makes it abundantly clear that the only time Texas may set a 55 mph prima facie limit is for the purpose of getting Federal Money. This hardly appears to be a rational relationship to the curtailment of speed especially when the rational relationship between the curtailment of speed and public welfare was set at 70 mph just six years ago, i.e. prior to the passage of 23 USC 154.)*

*Since the advent of democracy as a world wide exemplar of a large government, it would seem proper to say tha the word"Soverign" underwent a new definition. Whereas it was once said that a Soverign could do no wrogn, and later it was said that a Soverign was unaccountable to the people except in certain areas; now it could be said that Soverigns <u>have no power</u> in certain areas for the tribe of persons (democracy) gave the Soverign no power in those areas. Thus, it is submitted is the true picture that sets the groundwork for substantive due process. A Soverign has no power to legislate in certain areas, viz, GRISWOLD v CONNECTICUTT 381 US 479; 14 LE(2) 510; 85 SC 1678. Likewise a Soverign must show - unless the same is abudnantly (intensly) apparent - the relationship between its action and the evil sought to be remedied.*

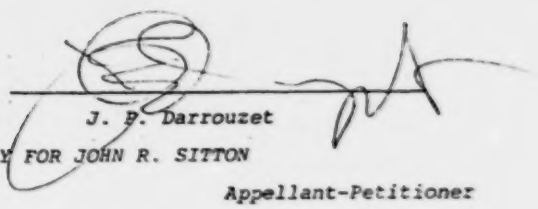
> *(This is really what TOE v WADE 410 US 113; 35 LE[2] 147; 93 SC 705 and its off-shoots are saying. The Soverign has no right to legislate in the area of the "liberty" of abortion unless there be a rational relationship between the act legislated aaginst and the evil sought to be remedied, and further such rational relationship must, via the standards used, be made to appear. In Re MURCHINSON 349 US 133' 99 LE 942; 75 SC 623 cites with approval OFFUT v US 348 US 11; 99 LE 11; 75 SC 11 where it was said "Therefore, justice must satisfy the appearance of justice. Cf. WALL v AMERICAN OPTOMETRIC ASSN. 379 FS 175, affd. 419 US 888.)*

The Travis County Attorney has not answered this argument except to say "it isn't so" and "is clearly without merit" citing no authority except her own to sustain her answer.

PRAYER

SITTON respectfully renews the prayer of his Statement and/or Petition heretofore filed herein.

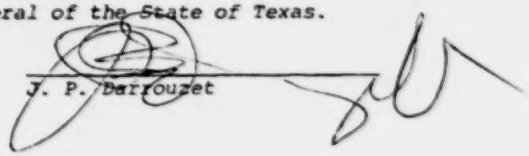
RESPECTFULLY SUBMITTED



J. P. Darrouzet
ATTORNEY FOR JOHN R. SITTON
Appellant-Petitioner

CERRIFICATE OF SERVICE

The undersigned attorney ehreby certifies that a a copy of the above has been forwarded to the County Attorney of Travis County, Texas and the Attorney General of the State of Texas.



J. P. Darrouzet

DWAYNE EDWARD HOWARD, Appellant
No. 56,991. v.
The State of Texas, Appellee

Appeal from Travis County
Attorney: Hugh Lowe

O P I N I O N

This is an appeal from a conviction for possession of less than two ounces of marihuana. Punishment was assessed at a $100 fine and 5 days in jail, and appellant was placed on probation for 12 months.

On the evening of Feb. 5, 1977, appellant and two female companions were in an area behind the Everett Hardware Store in Austin at 9:40 p.m., lying in leaves, when they were approached by a city police officer investigating noises he heard from that area. The officer asked the group what they were doing there and one of the girls answered, "Nothing." They were all ordered against the wall of the building so they could be frisked. Appellant was then asked what he was doing there, and he said he was drinking beer. When asked if he had ever been arrested before, he said hes he had, for burglary. All three were then placed under arrest for loitering under Austin City Ordinance 23-9. After they were arrested and placed in the police car, a baggie of marihuana was taken from appellant's right sock.

In his first ground of error appellant challenges the denial of his motion to suppress, contending the contraband was recovered as a result of an unlawful arrest under an unconstitutional municipal ordinance.[1] The ordinance under challenge provides:

"It shall be unlawful for any person within the city to be in the nighttime in or about public or private buildings or premises, where he has no right or permission to be, under suspicious circumstances, and without being able to give a satisfactory account of the same."

This ordinance in substantially the same form was approved over challenges to its constitutionality in Sims v. St., 391 S.W.2d 63[illegible] In that opinion, however, we neglected to consider the vagueness of the element of this offense of "without being able to give a satisfactory account of the same." This standard, we find, is patently unconstitutional on its face, because it is "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application...." Baker v. St., 478 S.W.2d 445, 449, quoting Connally v. Genl. Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed.322.

There is no statutory designation of what would constitute a "satisfactory account." In practice, such a standard delegates unguided and unrestrained discretion to the arresting officer to decide what answers given by a potential arrestee are "satisfactory account[s]" and which are not. The result is that the ordinance not only "[l]ack[s] intelligible standards to guide those charged with its enforcement" (Baker, supra), but in fact affirmatively assigns to the arresting officer the legislative responsibility to give content and meaning to the ordinance by defining one of its elements with the "fill in the blank" standard that makes the scope of offending conduct a product of the officer's subjective determination of whether he finds the detainee's account of the circumstances in which he is found, to be, in the officer's judgment, satisfactory."

Having found the ordinance under which appellant was arrested to be patently unconstitutional on its face, we must determine whether the contraband seized pursuant to that arrest should have been suppressed by the trial court.

In the recent decision in Mich. v. DeFillippo, 25 Cr.L. 3211, the Court announced a rule permitting the introduction of evidence seized pursuant to an arrest under a law then in force, even though it is subsequently declared unconstitutional. The Court, however, did recognize "the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." What law could be more grossly and flagrantly unconstitutional than one that leaves to the arresting officer the task of giving content to one element of the offense, and of deciding the scope of the ordinance's prohibition, according to his own judgment of what constitutes a "satisfactory account" by the potential defendant? We hold the ordinance under which appellant was arrested exhibits a vagueness obvious to "any person of reasonable prudence," and the evidence should have been suppressed.

Alternatively, we note that in Baker, supra, a knife seized incident to an arrest under an unconstitutional vagrancy statute was ordered suppressed in a prosecution for unlawfully carrying a switchblade knife. We reaffirm the soundness of the Baker rule as a matter of state law, independently of the standard announced in DeFillippo, supra, and hold that the evidence seized incident to an arrest under an unconstitutional law is excludable under Texas law. See, Art. 1, §19, Tex.Const.; Art. 38.23, C.C.P.

Because the trial court erred in denying appellant's motion to suppress, the ground of error is sustained.

The judgment is reversed and the cause remanded.

(Delivered September 19, 1979) En Banc

Odom, Judge

Onion, P.J., Douglas, J., T. Davis, J., and Dally, J., dissent.

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[1] The ordinance is not susceptible of a narrowing construction by severing the invalid language, as was done in Delorme v. St., 488 S.W.2d 808. "[I]f one element of a single offense is found constitutionally defective, the offense must fall, because to sever the single element would broaden the scope of the statute, prohibit new conduct not prohibited by legislative act, and violate the legislative intent. The courts would be creating a new offense, prohibiting conduct not theretofore an offense." Hixon v. St., 523 S.W.2d 711, 717 (concurring opinion).

RONALD RALPH HERNANDEZ, Appellant

NO. 59,930 v. - - - Appeal from TRAVIS County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a speeding conviction under Article 6701d, Sec. 166, V.A.C.S. The record reflects that the case was originally tried in the Justice of the Peace Court, Precinct No. 4, Travis County. The appellant was found guilty and assessed a fine of $12.50. Appellant appealed to County Court at Law No. I of Travis County. He was found guilty and punishment was assessed at a fine of $101.00.

The appellant was issued a ticket for doing 70 miles per hour in a 55 mile per hour zone. The appellant believed that his speed was between 58 and 60 miles per hour. The State and the appellant stipulated to the fact that the appellant's speedometer was found to be off by 10 miles per hour.

In grounds of error one and two, the appellant contends that the complaint is fatally defective in that it fails to allege a culpable mental state, and that reversible error occurred because the State failed to prove a culpable mental state.

This Court has recently held in Zulauf v. State, ___ S.W.2d ___, No. 62,307 (Tex.Cr.App., delivered December 12, 1979) that speeding is a strict liability offense which does not require that a culpable mental state be alleged. In Zulauf v. State, supra, we said:

> "The clear command of Article 6701d, Sec. 166, supra, that:
>
> '... no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the circumstances then existing...'
>
> provides more than adequate support for our holding herein that the Legislature intended to make speeding a strict liability offense where liability would not be contingent upon the allegation of a culpable mental state."

As no culpable mental state is required to constitute the offense of speeding, the State did not err in failing to allege and prove one. These two grounds of error are overruled.

In grounds of error three and four, the appellant contends that the complaint is fatally defective because it fails to state an offense. The appellant urges that the exact location of the offense is an element which must be alleged, because without such an allegation, appellant is not informed as to why it was unreasonable and imprudent to be traveling at 70 miles per hour.

Article 45.17, Vernon's Ann.C.C.P. provides that a complaint must state:

> (1) The name of the accused, if known, and if unknown, shall describe him as accurately as practicable;
>
> (2) The offense with which he is charged, in plain and intelligible words;
>
> (3) That the offense was committed in the county in which the complaint is made; and
>
> (4) It must show, from the date of the offense stated therein, that the offense is not barred by limitation."

The complaint in this case, omitting the formal parts, states:

> "Ronald Ralph Hernandez, did then and there operate and drive a vehicle, to-wit: pickup upon a public street and highway of Texas, at the unreasonable, imprudent and unlawful speed of 70 miles per hour which was then and there a speed greater than was reasonable and prudent under the conditions then existing, at which time and place the prima facie reasonable and prudent speed limit was 55 miles per hour." (Emphasis added)

A motion to quash was not filed; therefore, only defects which would render the complaint fundamentally defective may now be considered. Scott v. State, 543 S.W.2d 128 (Tex.Cr.App. 1976). The complaint must allege all of the essential elements of the offense to be sufficient. See American Plant Food v. State, 508 S.W.2d 598 (Tex.Cr.App. 1974). We find that the

offense with which the appellant is charged is set forth in the complaint in plain and intelligible words, as required by the statute. The complaint is not fundamentally defective because it does not explain how the 55 mile per hour limit was established. These grounds of error are overruled.

Appellant in his final ground of error, contends that the trial court erred in finding him guilty since the State admitted that the appellant was operating under a mistake of fact, thereby making V.T.C.A. Penal Code, Sec. 8.02 applicable.

Section 8.02(a), supra, states:

> "It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for the commission of the offense."

Mistake of fact constitutes a defense only if it negates the culpable mental state. As the offense of speeding does not require the proof of a culpable mental state, Sec. 8.02, supra, is not applicable. See Zulauf v. State, supra. This ground of error is overruled.

The judgment is affirmed.

PER CURIAM

(Delivered January 16, 1980)

By: Panel 3; 1st Quarter, 1979

Carl E. F. Dally, Judge
W. C. Davis, Judge
Sam Houston Clinton, Judge